STATE OF MICHIGAN

IN THE SUPREME COURT

FIRAS QARANA,

Plaintiff/Appellee,

v.

PARAGON INVESTMENT COMPANY, d/b/a THE ROYAL OAK MUSIC THEATER, JOHN DOE #1, JOHN DOE #2 and JOHN DOE #3,

Defendants,

and

NORTH POINTE INSURANCE COMPANY,

Garnishee-Defendant/Appellant.

Court of Appeals No. 244797

Lower Court Case No. 00-022528-NI

Supreme Court Case No. _____

127488

_____/

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PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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APPELLANT ANSWERED, "NO."
APPELLEE ANSWERS, "YES."

B. WAS THE COURT OF APPEALS CORRECT IN REVERSING APPELLANT'S SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) ON THE FACTUAL ISSUE OF WHETHER IT WAS ACTUALLY PREJUDICED BY DEFENDANT'S ALLEGED FAILURE TO COOPERATE WITH ITS DEFENSE OF THE UNDERLYING ACTION?

APPELLEE ANSWERS, "YES."
APPELLANT ANSWERS, "NO."

I. INTRODUCTION

Appellant, North Pointe Insurance Company, Garnishee-Defendant and insurer of Defendant Paragon Investment Company, which is not a party to this appeal, seeks leave to appeal the decision by the Court of Appeals reversing the Oakland County Circuit Court's granting of summary disposition in its favor.

This appeal followed competing motions for summary disposition filed by the parties relative to a post-judgment garnishment claim. Prior to the action that is the subject of this appeal, the Oakland County Circuit Court entered a Default Judgment in favor of the Plaintiff/Appellee, Firas Qarana, who was injured at the bar owned by Defendant Paragon Investment Company, in the amount of $85.846.12. Subsequently, Plaintiff garnished Defendant's insurance company, Garnishee-Defendant/Appellant North Pointe Insurance Company, for payment of the judgment amount. Appellant defended this garnishment action on the basis that is not indebted to Paragon Investment Company for any amount and does not possess or control defendant's property, money, etc. See Garnishee Disclosure Form, paragraph 2a, which, along with its addendum, is attached as Exhibit 1.

II. STATEMENT OF FACTS

On or about January 29, 2000, Appellee Firas Qarana was an invitee at the Royal Oak bar known as "The Royal Oak Music Theater." The Royal Oak Music Theater was, at all times pertinent to this lawsuit, owned by Defendant Paragon Investment Company. While at The Royal Oak Music Theater, Appellee witnessed a man antagonizing Appellee's girlfriend. Appellee approached the scene, interceded on his girlfriend's behalf, and told the other man to leave his girlfriend alone.

The other man, Defendant John Doe #1, then struck Qarana, after which a brief scuffle ensued. Paragon's security personnel broke up the fight and escorted the participants to the door of the bar. There they thrust Appellee and John Doe #1 out of the bar. After both of them were out on the sidewalk, Paragon's security personnel watched while Defendant John Doe #1 and his cohorts, John Doe #2 and John Doe #3, who were already outside the bar, proceeded to savagely beat Appellee. Paragon's security personnel made no effort of any kind to protect Appellee or stop the beating which took place in front of the bar and in the premises controlled by the bar. No one called the police. When it was over, Appellee was hospitalized and required plastic surgery to repair the damage. Although some of his injuries healed, Appellee retains permanent facial scarring through his lip.

Appellee filed suit in Oakland County Circuit Court on April 19, 2000 against Paragon and John Doe #1, #2, and #3, alleging negligence as against Paragon and assault and battery against the unnamed Defendants.

On or about May 23, 2000, Defendant Paragon answered the Complaint through its counsel, Michael Ewing, who was employed by Appellant North Pointe Insurance Company, which agreed to defend and indemnify Paragon. Appellant commenced its representation on May 1, 2000. See letter of Nancy Foster to Michael Novak dated 5/1/00, attached as Exhibit 2. However, Ewing did not discuss the merits of the case or any possible defenses with anyone at Paragon before he answered the Complaint on its behalf. Ewing deposition, pp. 11-14, attached as Exhibit 3. Defendant also served Appellee with its First Set of Interrogatories along with the Answer. Appellee answered the Interrogatories on or about June 16, 2000. Defendant then scheduled the Appellee's deposition for August 22, 2000.

On June 22, 2000, Appellee sent Defendant Paragon his First Set of Interrogatories and Requests for Production of Documents. Defendant failed to answer same, even though they were due by July 20, 2000. MCR 2.309 (B)(4); MCR 2.310 (C)(2).

As discovery was proceeding normally, Paragon filed Chapter 7 bankruptcy on August 17, 2000 in the Eastern District of Michigan, Case No. 00-52267-swr. On September 20, 2000, the trial court entered an Administrative Order staying the proceeding because of the automatic stay in effect as a result of the bankruptcy filing. Following a motion in the bankruptcy court, to which neither Paragon nor Appellant objected, on October 26, 2000 the United States Bankruptcy Court ordered Appellee relieved from the automatic stay for the sole purpose of pursuing his remedies against Appellant in the trial court. See Order for Relief From Automatic Stay, attached as Exhibit 4.

Between Michael Ewing's entry into the case on Paragon's behalf on May 1, 2000 when the insurance company wrote a letter to Michael Novak, an attorney for Paragon, requesting the names of potential witnesses, and Paragon's bankruptcy, 108 days elapsed. During that time, Ewing's efforts to communicate with his client and to investigate Appellee's claims were almost non-existent See Chronology, attached as Exhibit 5. Ewing wrote three letters and made two telephone calls to his client. In addition to the aforementioned letter to Michael Novak, which Ewing did not even write, Ewing wrote Robert Fox, the general manager of the Royal Oak Music Theater, on May 9, 2000 requesting names of employees who worked the night of the assault. See Letter of 5/9/00, attached as Exhibit 6. Ewing then testified that he may have called Michael Novak once between May 9 and May 23, 2000, but he was unable to remember the substance of the conversation. Ewing dep., p. 12.

The next communication was not until June 23, 2000 when Ewing sent a letter to Robert Fox accompanying Appellee's discovery requests and asking Paragon to answer said discovery by July 24, 2000. See letter of 6/23/00, attached as Exhibit 7. Interestingly, Ewing never sent Fox a follow up letter to his previous one asking about potential witnesses and employees.

Ewing had no further contact with his client until July 14, 2000, when he sent a letter to Michael Novak informing him of the trial date set in this case in January, 2001. See letter of 7/14/00, attached as Exhibit 8. Ewing testified that he may have called someone at Paragon to follow up on the names of the employees of Paragon who worked the night of the assault, but he could not remember whether he actually spoke with someone. Ewing dep., pp. 21-22.

Ewing testified that his secretary may have called and left a message or two for Robert Fox to follow up on the status of the interrogatory answers which Ewing sent to Fox on June 23, 2000. Ewing dep., pp. 16-17. Ewing also testified that he spoke to Michael Novak sometime between July 26 and August 10, 2000 regarding the list of employees. Ewing dep., pp. 23-24. Ewing testified that he next spoke with his client on August 10, 2000 when Novak told him that Paragon was about to file for bankruptcy protection. Ewing dep., p. 24. Paragon filed for bankruptcy one week later.

On or about November 4, 2000, the case was reinstated in this Court by stipulation of the parties but the Appellee's First Set of Interrogatories and Requests for Production of Documents remained unanswered. As such, on December 19, 2000, Appellee filed his Motion to Compel Discovery for a hearing which took place before the trial court on January 3, 2001.

From the date of Paragon's bankruptcy until the motion hearing on January 3, 2001, 139 days elapsed. During that time, Ewing did not make a single attempt to communicate with his client or to investigate Appellee's claims. See Chronology, attached as Exhibit 9. He did, however, write his

client two clerical letters. On November 29, 2000, Ewing wrote Novak informing him of a scheduled pre-trial conference on December 14, 2000. See letter of 11/29/00, attached as Exhibit 10. Ewing also wrote a letter on December 20, 2000 informing Novak of a new trial date. See letter of 12/20/00, attached as Exhibit 11. Ewing did not notify anyone at Paragon or either Paragon's bankruptcy attorney or the bankruptcy trustee of the motion to compel discovery which was pending, nor did he even contact anyone associated with the bankruptcy until after the court ordered Paragon to answer its discovery. Ewing dep, pp. 39-40.

At the January 3, 2001 hearing, the court granted Appellee's Motion and ordered Defendant to answer the discovery within 14 days, or by January 17, 2001. See Order Granting Motion to Compel Discovery, attached as Exhibit 12.

The order compelling discovery spurred Ewing to start writing letters and making telephone calls. See Chronology, attached as Exhibit 13. On January 3, 2001, Ewing wrote Novak to inform him of the court's order and threatening to withdraw his representation. See letter of 1/3/01, attached as Exhibit 14. On January 8, 2001, Novak wrote Ewing and explained that because of the Chapter 7 bankruptcy Paragon no longer existed and Ewing should contact the bankruptcy trustee, Mark Shapiro. See Novak letter to Ewing dated 1/8/01, attached as Exhibit 15. Ewing called Shapiro asking for information and Shapiro wrote back on January 11, 2001 explaining that he had no knowledge about Paragon's business prior to the bankruptcy. See Shapiro letter dated 1/11/01, attached as Exhibit 16. On January 16, 2001, Ewing then wrote back to Novak informing Novak that Shapiro stated he could not help. See Ewing letter dated 1/16/01, attached as Exhibit 17. The next day, January 17, 2001, Ewing wrote Novak again and threatened to withdraw as counsel. See Ewing letter dated 1/17/01, attached as Exhibit 18.

Paragon did not answer the discovery by January 17, 2001, so on that date, Appellee filed a Motion for Entry of Default and Default Judgment. The matter was set for hearing on January 31, 2001. On or about January 22, 2001, Michael Ewing filed his Motion to Withdraw Representation, which was also scheduled for hearing on January 31, 2001.

In his Motion to Withdraw, Ewing admitted that he was retained by Appellant North Pointe and that he sought assistance in his attempt to answer the discovery both from Michael Novak, an attorney for Defendant, as well as the bankruptcy court trustee, Mark Shapiro. Both attorneys, Ewing stated, were either unwilling or unable to assist him in answering discovery.

On January 31, 2001, the Court permitted attorney Ewing to withdraw and ordered the Defendant to appear with counsel within 30 days. Regarding Appellee's Motion for Default and Default Judgment, the Court ordered Defendant to answer the discovery by March 7, 2001 or else the Court would enter a default and default judgment after that date. See Order, attached as Exhibit 19. Only a mere 28 days elapsed between the entry of the order compelling discovery and Ewing's withdrawal. During those 28 days, Ewing did more regarding the defense of this case than he had during the first 247 days of his representation.

Having not received any discovery from Defendant, Appellee filed his second Motion for Entry of Default and Default Judgment and scheduled a hearing for March 14, 2001. The motion was served by mail upon two representatives of Defendant as provided to Appellee by Michael Ewing and copied to Ewing. Defendant failed to appear and the court entered both a default and a default judgment, based upon the sworn testimony of the Appellee, against the Defendant on March 14, 2001. The amount of the judgment was $85,846.12 plus continuing statutory interest. That same day, Appellee served notice of the entry of the default and default judgment, as well as the judgment

itself, upon the two representatives of the Defendant. Appellee was never able to discover the identities of Defendants John Doe #1, #2, and #3 and so these defendants have never been served or otherwise involved in this action.

No post-judgment action was taken by either Defendant or Appellant to challenge this judgment. In fact, at the summary disposition hearing in the trial court, Appellant acknowledged that should the court find in Appellee's favor, Appellant would be obligated to pay the judgment amount, plus interest and costs. Motion hearing, pp. 43-44.

Following the entry of the Judgment, Appellee caused to have issued a Request and Writ for Garnishment (Non-Periodic) on May 2, 2001. It was served and received by Appellant on May 3, 2001. Within the statutory time period, Appellant filed its disclosure on or about May 11, 2001. In the Disclosure, Appellant denied any indebtedness on behalf of Defendant. The basis for its denial was Defendant's alleged breach of the insurance contract for failure to cooperate with the defense of the action. (Garnishee Disclosure, paragraph 4). Appellant also announced that it had filed a declaratory action in the circuit court to determine its liability, (Garnishee Disclosure, paragraph 5), and that its liability could not be ascertained until the declaratory action was concluded. (Garnishee Disclosure, paragraph 7).

As required by MCR 3.101 (L)(1), Appellee served written interrogatories upon Appellant on May 23, 2001. Again these were not answered timely and Appellee filed a Motion to Compel Answers to Interrogatories. Appellant stipulated to an Order Compelling Discovery which provided it until July 24, 2001 to answer its interrogatories. Some answers were delivered timely but others were not so Appellee, again, filed a Motion to Compel Answers to Interrogatories, which resulted

in yet another Order Compelling Discovery entered by the trial court on September 12, 2001, ordering Appellant to answer the Interrogatories by September 26, 2001.

In the meanwhile, Appellant filed its declaratory action against Defendant Paragon in the Oakland County Circuit Court, North Pointe Insurance Corporation v. Paragon Investment Company, Inc., Case No. 01-029678-CK. Appellant failed to have the automatic stay lifted by the bankruptcy court before suing a bankrupt debtor so the case was closed by administrative order on August 15, 2001. See Order for Administrative Closing, attached as Exhibit 20. It remains closed to this date.

New counsel substituted in for Appellant in this case and supplemented the Interrogatory answers on or about September 24, 2001. New counsel also changed some of the answers from those originally given. See Answers to Interrogatories served on or about July 24, 2001 attached as Exhibit 21 and Answers to Interrogatories served on or about September 24, 2001, attached as Exhibit 22.

III. ARGUMENT

A. SHOULD THIS COURT UPHOLD ALMOST 50 YEARS OF PRECEDENT WHICH HAS CONSISTENTLY DEFINED A TERM IN THE INSURANCE CONTRACT, "COOPERATE", WHICH REQUIRES THAT AN INSURANCE COMPANY DEMONSTRATE THAT IT HAS BEEN PREJUDICED BY ITS INSURED'S NON-COOPERATION IN ORDER TO AVOID ITS OBLIGATION TO PAY ITS CLAIMS?

APPELLANT ANSWERED, "NO."
APPELLEE ANSWERS, "YES."

Appellant's application is based on the premise that the insurance contract before this Court "is unambiguous and should be enforced as its terms dictate." Wilkie v. Auto-Owners Ins.Co., 469 Mich. 41, 51; 664 N.W.2d 776, 782 (2003). However, this Court can, and is mandated to, interpret contract language which is not defined adequately by the parties. While it is easy to suggest, as Appellant does, that this Court has rewritten insurance contracts based upon the assumption of

contracting parties' reasonable expectations, the fact of the matter here is that for almost 50 years, this Court and the Michigan Court of Appeals have defined a term in insurance contracts – "Cooperate" – in a manner which requires an insurance company involved in a garnishment action to prove that it has been prejudiced by the failure of its insured to cooperate with the defense of an injury lawsuit.

This is neither new law or a new concept. Appellee will delve into the history of this definition below, but the reason that this is important is because Appellant knew of this obligation and definition. If it did not, it could have drafted its contract to define "cooperate" as it wished as the concept of prejudicial non-cooperation has been the law in Michigan since at least Leach v. Fisher, 345 Mich. 65, 74 N.W.2d 881 (1956). But its own actions speak louder than its words in its application to this Court.

1. Appellant's contract does not provide it the right to cease its defense without a legal determination that Paragon breached the contract.

In its answers to interrogatories, Appellant relies upon its contract language setting forth a condition of its insuring the Defendant. However, there is nothing in the contract which permits it to terminate its representation without court approval. See Contract, attached as Exhibit 23. That is why in the first answer to interrogatories Appellant relied upon its declaratory action and the hope that the trial court would permit it to terminate its insurance contract. Of course, since the declaratory action was filed without permission of the bankruptcy court, it was stayed and has never been decided. By the time of the second answers to interrogatories, Appellant abandoned this argument and instead relied upon the court's approval of Michael Ewing's withdrawal. However, there is no contact language that permits Appellant to unilaterally determine that Defendant's failure to cooperate permits it to walk away from a pending action and disclaim its coverage.

It is not Defendant which breached the contract by failing to cooperate. It is Appellant who breached the contract by ceasing its defense without court approval.

2. Michael Ewing's withdrawal as counsel did not effectively terminate Appellant's responsibilities to defend and indemnify Paragon.

There has been no declaratory judgment that permits Appellant to cease its coverage. Three weeks after Michael Ewing withdrew his representation, Appellant filed its declaratory action. Evidence of its actions demonstrates that even Appellant believed that Ewing's withdrawal did not sufficiently terminate the insurance contract. Nevertheless, in the courts below Appellant attempted to rely on this withdrawal as court approval to terminate the contract. Now it tries to argue that it could unilaterally declare its contract void, without court approval.

Michael Ewing claimed that his attorney-client relationship had broken down between his client, Defendant Paragon, and himself. He claimed in his motion to withdraw that he could not get assistance from his client to answer Appellee's discovery requests and that he had no way to answer the requests himself. Because the attorney-client relationship had disintegrated, the trial court permitted Ewing to withdraw.

Appellant tried below to bootstrap its termination of coverage onto Ewing's withdrawal as counsel for Defendant. "The general rule is that '[n]o attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not to the insurer.'" Kirschner v. Process Design Associates, Inc., 459 Mich. 587, 598, 592 N.W.2d 707, 711 (1999), citing Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 197 Mich.App. 482, 492, 496 N.W.2d 373 (1992) aff'd 445 Mich. 558, 519 N.W.2d 864 (1994).

As a matter of law, Appellant had no attorney-client relationship with Ewing. His withdrawal had nothing to do with the insurance contract. There is no dispute that Appellant retained Ewing on behalf of Defendant (See Answers to Interrogatories, #10) but there is nothing in the contract, or the law, which permits Ewing's withdrawal to act as a declaratory judgment nullifying the insurance contract.

Ewing withdrew from the case on January 31, 2001. Appellant filed its declaratory action on February 20, 2001. In its Disclosure, Appellant did not attempt to make this connection between Ewing's withdrawal and coverage, nor was it relied upon in the first set of answers to Appellant's interrogatories. It was not until the declaratory action was stayed that Appellant raised the issue that Ewing's withdrawal was tantamount to Court approval to terminate the insurance contract.

Until the summary disposition which is the subject of this appeal, there had been no court order terminating Appellant's insurance contract. There has been no declaratory judgment. There is not even a declaratory action currently pending. Michael Ewing's withdrawal permitted him to cease his attorney-client relationship with Defendant. His withdrawal had nothing to do with Appellant as he did not represent it. Appellant's attempt to claim that Ewing's withdrawal terminated the contract is both illegal and disingenuous. If Appellant was truly relying on this withdrawal order, it would not have filed its declaratory action three weeks after the Court permitted Ewing to withdraw.

3. Defendant's alleged failure to cooperate with the defense did not prejudice Appellant.

Appellant argues that because Defendant failed to assist it in answering discovery requests that it failed to cooperate with the defense. However, in some situations, failure to cooperate is not even a valid defense. See Coburn v. Fox, 425 Mich. 300, 389 N.W.2d 424 (1986) (In no-fault auto

accident case, failure to cooperate is not a defense to a garnishment action.) In this case, while there is no statutory requirement for Defendant to carry insurance, simply failing to cooperate is not sufficient to avoid liability. In garnishment proceedings, Appellant must prove that it suffered actual prejudice.

a. Defendant did not fail to cooperate with the defense.

Appellant's attorney, which it hired to defend Defendant, made very few efforts to secure the cooperation of the Defendant. And when he tried to illicit cooperation, he waited until it was very nearly too late, he contacted the wrong people, and he made very little actual effort.

In Burgess v. American Fidelity Fire Ins. Co., 107 Mich. App. 625, 310 N.W.2d 23 (1981), the Court of Appeals held that an insurance company cannot "sit idly by, knowing of the litigation, and watch its insured get prejudiced." Id., at 630.

Ewing answered the complaint after Appellant undertook the defense of Paragon. The Michigan Court Rules require that an attorney who files a pleading above his signature certify that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." MCR 2.114 (D)(2). Ewing admitted that he had not investigated this claim prior to the filing of his answer. Ewing dep., pp. 11-14. Following the filing of his answer and until Paragon filed bankruptcy, Ewing only sent his client a couple of letters and made a few telephone calls.

The rules of ethics require that the attorney Appellant hired to defend Defendant do more. Ewing had a duty to Paragon -- his client -- once he appeared in the case and answered the Complaint to zealously advocate for his client and to act with diligence.

Rule 1.3 Diligence.
A lawyer shall act with reasonable diligence and promptness in representing a client.
Comment:
A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. . . . A lawyer's workload should be controlled so that each matter can be handled adequately.
Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. . . .
Unless the relationship is terminated as provided . . . a lawyer should carry through to conclusion all matters undertaken for a client.MRPC 1.3 and Comment

No matter how Appellant wants to impress upon this Court that Ewing acted appropriately in the defense of his client, the facts do not support that conclusion. He answered the Complaint without any knowledge of the Plaintiff's facts or the validity of any of his answers. (Ewing dep., pp. 12-14) He signed the Answer in violation of MCR 2.114. He made no attempt to conduct discovery of the Appellee's case or to investigate his own client's potential defenses. He procrastinated in his obligation to answer Appellee's discovery.

In its application, Appellant twice suggested the importance of an attorney meeting with his client to formulate a defense. (Application, p. 10) Ewing, however, never tried to schedule a meeting with his client. Upon the filing of the bankruptcy, and even after the automatic stay was lifted, he conducted no activity on the file. He never objected to the lifting of the automatic stay, which was entered by the bankruptcy court for the sole purpose of seeking recovery from Appellee's insurance proceeds. At deposition he admitted, "I don't have any understanding of bankruptcy at all." (Ewing dep., p. 39) Thus, Appellant cannot hide behind its insured when its attorney did nothing to defend the case.

Appellant also tries to rely on a statement made by one of Appellant's attorneys, Daniel Landman, in Plaintiff's Motion to Compel Discovery. Landman's statement was, "It's unfortunate that Mr. Ewing is not getting more cooperation from his client or from the client's corporate counsel." (Application, pp. 6-7) However, this statement was based on Ewing's response in answer to Plaintiff's Motion to Compel Discovery that he was having difficulty locating his client or investigating the claim and comments which he made to Mr. Landman prior to the hearing. (See Answer of Defendant To Plaintiff's Motion to Compel Discovery, attached as Exhibit 24[1]) Landman had no independent knowledge as to whether Ewing's statements were true. (See Affidavit of Daniel Landman, attached as Exhibit 25)

As the facts turned out, Ewing's statements were not true. According to Appellant's own chronology, Ewing had no contact with anyone involved with Paragon from August 10, 2000 until he spoke with Michael Novak by telephone on January 8, 2001 (except for mailing two court date letters and a letter sent on January 3, 2001 informing Novak of the Order which had been entered that day). (Application, pp. 6-7) He made no attempt to make contact or investigate the claim. In other words, when Ewing filed his answer with the court stating that he could not locate his client, it was false and another violation of MCR 2.114. Ewing never made any attempt to locate anyone. He did not even inform anyone at Paragon or the bankruptcy trustee that there was a motion to compel pending. (Application, p.6) Appellant suggests that the trial court permitted Ewing's withdrawl because of the "pattern of willful non-cooperation on the part of Mr. Ewing's client"

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[1] In paragraph 5 of the Answer, Ewing stated, "In further answer, defendant states that employees/agents/servants of defendant cannot be located and therefore counsel is unable to investigate and formulate answers to discovery. Defendant is now a defunct corporation and counsel is unable to answer the discovery requests and provide a signor."

(Application, p. 11). While true that the court permitted the withdrawl, Ewing lied at the hearing. Appellant's own chronology demonstrates that he did not attempt to discuss the motion to compel discovery with anyone involved with the Defendant until after the motion was already granted. Appellant's statement is disingenuous as its own chronology does not support the validity of the statement.

Appellant should be bound to its statements and actions. Since Ewing threatened to file a declaratory judgment action in his letter of January 3, 2001, and North Pointe filed such an action three weeks after Ewing withdrew as counsel, Appellant admits that Ewing's withdrawal did not end its obligation to defend and indemnify its insured. Even in its first answers to interrogatories, Appellee was still relying on the declaratory action to determine its obligations. As there has been no determination on the declaratory action, the insurance contract still has full force and effect.

Paragon did not fail to cooperate and it did not prejudice Appellant. If anything, Appellee's own attorney, which it employed to defend Paragon, failed both of them.

Ewing could have done any or all of the following to defend his case and to seek the cooperation of his client: 1) Visited the Royal Oak Music Theater during business hours to meet with his client to discuss the interrogatories and their answers and to get the employment and business records he required; 2) Sent an investigator or paralegal to the Royal Oak Music Theater for the same purpose; 3) Deposed the Plaintiff; 4) Deposed the Plaintiff's corroborating witness to test the veracity of Plaintiff's claims; 5) Sent the Plaintiff for an independent medical examination; 6) Contacted his client's payroll company and recovered employee records from that entity; or 7) Contacted the Royal Oak police department for information which they may have had relative to the

names and addresses of Defendant's security personnel. This is not meant to be an exhaustive list, but just examples of efforts which Ewing could have made, but did not.

Once Defendant filed Chapter 7 bankruptcy and closed its doors, the corporation ceased to exist as it did before and, in effect, died. Following the filing, the bankruptcy court took control of Defendant's assets, liabilities, and possessions, and appointed a trustee, Mark Shapiro, to oversee the disposition of Defendant's assets to its creditors.

In the four and ½ months which passed between Defendant's filing of its bankruptcy petition and the eventual granting of Appellee's motion to compel discovery in the trial court, Ewing did not make a single effort in any form to defend this case. Ewing neither communicated with his contacts at Defendant's company, nor did he communicate with the trustee, the debtor's attorney or the bankruptcy court. He did nothing. He let the proverbial trail get cold, he allowed employee files to be misplaced, and he failed to pursue any defense of this action.

Ewing could have, and probably should have, done all of the following after Defendant filed bankruptcy: 1) Appeared in bankruptcy court during Appellee's motion to lift the automatic stay and/or objected to said motion; 2) Immediately contacted Defendant's bankruptcy attorney, Karin Avery, and the trustee, Mark Shapiro, for assistance with the employment records he sought; 3) Filed a motion in bankruptcy court demanding the court order the Defendant/debtor to assist in his defense and for his client to turn over the employment records he sought; 4) Subpoenaed Robert Fox to appear at a deposition to discover information about his client and its employees, including the location of employment records; 5) Subpoenaed Michael Novak for a deposition for the same reasons; 6) Contacted Defendant's payroll company and/or accountants for the employee records, which if he did not know the identity of these entities, he surely would have after Fox's or Novak's

depositions; 7) Deposed the Plaintiff, Plaintiff's witness and sent the Plaintiff for a medical evaluation; 8) Moved the bankruptcy court for an order lifting the automatic stay as to Defendant so that Appellant could file a declaratory action relative to the insurance contract and its defense; 9) Hired an investigator to track Defendant's security employees directly.

Instead, Ewing did none of the foregoing -- and nothing else either.

Once Defendant filed bankruptcy and the business closed, Michael Novak and Robert Fox had no reason or incentive to assist the defense of this claim. The company no longer existed and was judgment-proof. The only entity which had an incentive to defend this case was Appellant, and granted, with a bankrupt client, that was going to be more difficult than in the normal situation.

Although Appellant argues that "activist courts" have rewritten insurance contracts to require a finding of prejudice (Application, p. 14), in a case regarding the insurance coverage of a bankrupt corporation, our legislature has required liability insurance policies to include a provision

> that the insolvency or bankruptcy of the person insured shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, . . ., because of such insolvency or bankruptcy, then an action in the nature of a writ of garnishment may be maintained by the injured person, . . ., against such insurer under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy. MCLA 500.3006.

Appellant's policy includes this statutory language in section 4, part 1 of the policy, which states, "Bankruptcy or insolvency of the insured or of our insured's estate will not relieve us of our obligations under this Coverage Part." See Contract, attached as Exhibit 23.

The public policy considerations raised by this statute and the issues in this case require a finding in favor of the Appellee. Appellant has used Defendant's bankruptcy as its excuse to avoid

its own liability. If insurance companies were not required to defend and indemnify bankrupt companies, insurance companies would have an incentive to encourage their insureds' failure to cooperate.

When a company files bankruptcy, or otherwise goes out of business, it dies. Much like representing a dead person, it is impossible for the dead company to truly cooperate. If the company no longer exists, with whom can the insurance company cooperate? Does the insurer of a dead person get to disclaim liability because of its insured's failure to cooperate? A decision in this case in favor of the Appellant tells the insurance companies in this state that it is in their best financial interest to suggest, or more sinisterly to direct, its bankrupt insureds to not cooperate with the insurance company. Such a ruling would permit insurance companies to hide behind their insureds' bankruptcies in direct contravention of the aforementioned statute and their own insurance policies. Fundamentally, such a result would be unfair, contrary to the direction of the Legislature and disastrous public policy. This Court correctly warned about this possibility 46 years ago and held that such a policy would "encourage a wry state of affairs." Allen v. Cheathum, 351 Mich. 585, 598; 88 N.W.2d 306 (1958)

While it is true that Defendant died, its death did not cause a failure to cooperate. Appellant failed to appropriately defend its insured and to investigate the claim. Not until after the trial court ordered Defendant to comply with Appellee's discovery, did Ewing really try to illicit assistance. By that time, 139 days after the bankruptcy filing, he let the trail go cold, which by that time was virtually too late. Appellant's own inactions encouraged Defendant not to cooperate and then Appellant relied on that same lack of cooperation as its basis to cease its liability. Ewing failed to

make good faith efforts to secure his client's cooperation. Therefore, Appellant is liable for this garnishment.

b. For almost 50 years, the precedent in this state has been that an insurance company has to prove it was prejudiced as a result of its insured's failure to cooperate

There is a long judicial history in Michigan of this Court's requiring an insurance company to show that it was prejudiced as a result of its insured's failure to cooperate. Such a requirement makes perfect sense. If the insured was going to ultimately lose the case and the insurance company would have to pay the claim anyway, failure to cooperate would have little or no bearing on the outcome.

For good reason, appellate courts in Michigan have long placed the burden on insurance companies to demonstrate actual prejudice.

1. Brogdon

At the trial court and again in this Court, Appellant relies heavily on Brogdon v. American Auto Ins. Co., 290 Mich. 130, 287 N.W. 406 (1939). Brogdon was a garnishment appeal following a trial of an automobile accident case. The defendant in the underlying case gave his insurance company sworn testimony that he had nothing to do with the accident, which was the defense the insurance company pursued during the trial. During a recess in the midst of trial, the defendant admitted to an insurance company employee that he had, in fact, been the driver of the responsible automobile and that he struck the plaintiff. Defense counsel immediately moved to withdraw as counsel, which was granted, and the jury returned a verdict for the plaintiff.

During the subsequent garnishment action, the court determined that the defendant had defrauded his insurance company. It found that he "deliberately and wilfully violated the terms of

his contract" regarding fraudulent conduct. Id., at 137. The court refused to hold the insurance company to the obligation to indemnify an insured who blatantly lied to it.

Brogdon is distinguishable from the instant case in that Defendant did not defraud Appellant in any fashion. The Brogdon court determined that learning of its insured's fraud in the midst of trial was sufficient to absolve the insurance company of liability. In this case, not only was fraud not present, but Appellant had ample time to investigate Appellee's claim, secure witnesses, and settle the case before it was placed in a position where directing its attorney to withdraw was its only remaining option. Brogdon does not apply to the facts of this case.

2. Leach

This Court revisited Brogdon in Leach v. Fisher, 345 Mich. 65, 74 N.W.2d 881 (1956), and distinguished it while finding for the garnishor.

In Leach, an insurance company undertook the defense in an automobile accident case. Before the suit was filed, the defendant told his insurer an untrue version of the facts of the accident. After the suit was filed and eight days before trial, defendant admitted to his insurer that the previous statement was incorrect. Because of this fraud, the insurance company informed the defendant that it would continue to defend him, but reserved the right to deny liability for indemnification. At trial, a verdict was entered against the defendant.

In the subsequent garnishment action, the insurer defended on the basis that its insured had "deliberately and intentionally misled the garnishee defendant and its attorneys, that he had undertaken to assist the plaintiffs (one of which was his fiancee) in the prosecution of their respective actions . . . ." Id., at 70 (parenthetical added). The trial court upheld the garnishment regardless.

On appeal, this Court noted that when the insurer heard the divergent stories, no "further investigation was made for the purpose of obtaining possible information from disinterested witnesses." Id., at 71. The Court also noted, "No attempt was made to obtain a continuance of the cases in order to permit opportunity for further investigation or for attempts to make settlements." Id., at 72.

The Court then reviewed Brogdon and distinguished it. "Obviously the insurance carrier was prejudiced in the Brogdon case because of the conduct of the assured. It was not given the true facts until the trial was actually in progress. Its counsel who pursuant to the contract defended the case had no opportunity to make further investigation. Such is not the situation in the matter before us now. . . . It does not appear that any further investigation was attempted." Id., at 77. In conclusion, the Court affirmed the jury's determination that the insurance company had not been prejudiced.

This was not the first time this Court had required an insurance company to prove it had been prejudiced. But this was the first time prejudice was required in a case deciding whether an insured failed to cooperate. In fact, insurance companies have had to prove prejudice in other cases, such as those based on an insured's failure to notify the insurance company of a claim, since at least 1947, in this Court's case of Kennedy v. Dashner, 319 Mich. 491; 30 N.W.2d 46 (1947). See also, Weller v. Cummins, 330 Mich. 286, 47 N.W.2d 612 (1951).

In the instant case, Appellant made no investigation of either the Appellee or its own insured. More than eight months passed between Ewing's first involvement in this case and the entry of the order compelling discovery. In Leach, the Court held that with eight days before trial, the insurance company had ample time to move for a continuance, investigate further, or settle the case. The facts of this case demonstrate that pursuant to Leach, Appellant cannot prove it was prejudiced.

3. Allen

In 1958, this Court decided a case directly on point. In Allen v. Cheatum, 351 Mich. 585, 88 N.W.2d 306 (1958), a garnished insurer relied on its non-cooperation contract language in an attempt to avoid liability.

Allen was an automobile accident case in which the defendant moved away, leaving his insurance company attorney to ask for repeated adjournments so he could try to find his client. Eventually, the case came to trial and, having not been able to secure the appearance of the defendant, counsel moved to withdraw, which was granted, and the court entered judgment for the plaintiff.

During the subsequent garnishment action, the insurance company defended on the non-cooperation clause of its contract. The insurance company argued that it could not defend the action without the presence and cooperation of its insured. The court, deciding that the non-cooperation was not prejudicial, found for the plaintiff. The court determined that the presence of the defendant, who had in many ways verbally admitted liability, would not have assisted the defense in any way.

On appeal this Court agreed that defendant's failure to attend his trial and to cooperate with his attorneys was not prejudicial. It also affirmed the standard that the burden to prove prejudice was the responsibility of the insurer. The Court also worried in its opinion what might happen if it had decided in the insurer's favor:

> Any other rule might tempt some insurance companies (present company of course excepted) to be less concerned with defending or settling their claims than with subtly encouraging certain of their less desirable risks to "get lost" and stay lost while at the same time building a plausible if perfunctory record for an ultimate claim of noncooperation. The more desperate the claim, the more temptation

> might exist, a situation which in turn would not notably be relieved by the generally clogged state of our trial dockets. In the miraculous and possibly embarrassing event that at the last minute the lost should become found, still other companies (present company still excepted) might likewise be tempted to visit them with investigators or pelt them with elaborate legalistic communications filled with peremptory demands and dire forebodings more shrewdly calculated to drive or freeze their man into a state of noncooperation than to produce him in court. We are confident that no one connected with this case would want this Court by its decision to encourage such a wry state of affairs. Id., at 597-98 (parentheticals in original).

In this case, the Defendant "got lost" when it filed for bankruptcy. Even without the bankruptcy, Defendant may have been hampered in its defense by poor record keeping or an inability to find its former security personnel to testify in its behalf, or possibly, like in Allen, it may have been better off if it never saw these poorly-trained and unsupervised bouncers again. It may have been better for the defense if these people were never discovered or produced to testify as their testimony could have been damaging to the Defendant's case.

Allen demonstrates the reason for the prejudice requirement. If insurance companies were free to do nothing, or "sit idly by" (Burgess, supra), or even conspire with their insureds to encourage non-cooperation, it does not take a stretch of one's imagination to fathom that they would try any of these examples in order to avoid paying claims, especially expensive ones.

It is impossible to know whether the Defendant's employees would have testified in the Appellant's favor, but simply not knowing their testimony and alleging a failure to cooperate did not prejudice Appellant.

4. Bibb

In Bibb v. Dairyland Ins. Co., 44 Mich.App. 440, 205 N.W.2d 495 (1973), plaintiff and defendant were involved in an auto accident. Plaintiff's counsel and the Dairyland Insurance claims

department conducted settlement negotiations. Plaintiff filed suit and served defendant without informing Dairyland of the suit. Dairyland's insured did not inform Dairyland of the suit either and a default judgment entered. Upon a garnishment action, Dairyland defended based on a portion of the insurance contract which required its insured to notify it of the suit. Dairyland argued that since it did not have notice of the suit, it could not be expected to pay the judgment.

The Court of Appeals held that the insurance company could not sustain a showing of prejudice. "It is incumbent upon the defendant to sustain the burden of proof as to any prejudice suffered by a delay in the notification of suit being brought against the insured. However, defendant introduced no evidence as to any prejudice that might have been suffered. No evidence even suggests that defendant was prevented from making a timely investigation of the accident in order to evaluate claims or to defend against fraudulent, invalid or excessive claims. Indeed, it is reasonable to assume that a thorough investigation was a necessary requisite prior to entering into negotiations for a settlement of the claim." Bibb, at 446.

Even though this case relates to failure to cooperate and not failure to notify of the suit, Bibb is instructive. The court acknowledged that the insurance company had the opportunity to investigate, defend, or even settle the case before judgment entered, which negated any prejudice it may have suffered. In the instant case, as stated many times herein, Appellant made no investigation, failed to properly evaluate Appellee's claims, and made no effort to resolve the case when it learned it could not count on its insured to assist it as it might have preferred.

5. Hastings

Even though it is an unpublished opinion of the Court of Appeals, Appellant cannot stop itself from relying upon Hastings Mutual Insurance Co. v. Auto-Owners Insurance Co., Michigan

Court of Appeals Case No. 232947 (September 17, 2002) (unpublished) (attached as Exhibit 26). Even the trial court, in its opinion, erroneously determined Hastings to be "instructive." Trial Court opinion, pp. 3-4. Hastings, while not precedential, is interesting because it is the first case in Michigan to find that an insurance company established actual prejudice as a result of its insured's failure to cooperate.

Hastings arose out of a lawsuit alleging construction negligence. Because of the nature of the suit, engineering plans, construction information, and other specialized knowledge which was undiscoverable but from the defendant, was necessary to defend the action. During the lawsuit, the defendant's attorney, hired by his insurance company, made repeated and extraordinary efforts to secure the cooperation of his client. After these efforts failed, the insurance attorney moved to withdraw and a default judgment entered.

The Court found that the insurance company did not

> sit idly by, knowing of the litigation, and watch its insured become prejudiced. Rather, there is ample evidence in the record showing defendant's efforts to communicate with Moffit and encourage his cooperation in the underlying suit. Thus, this evidence dictates that no reasonable mind could differ in concluding that defendant sustained actual prejudice due to Moffit's failure to cooperate. Regardless of the other discovery sources that Plaintiff suggests 'clearly point to' Moffit's negligence, it is difficult to imagine how defendant could have completely protected its interest and determined the extent of its liability, if any, under these circumstances without the cooperation of the insured. Id., at 3 (citations omitted).

But what really happened in Hastings? The problem with relying upon unpublished opinions which do not include a full recitation of the facts is that a reference to "ample evidence in the record" is not instructive without describing the actual evidence in the record in the opinion. However, Appellant's counsel reviewed the Court of Appeals file in Hastings, which demonstrated a pattern

of effort which far exceeded the attempt made in this case. See Hastings chronology, attached as Exhibit 27.

The insurance company attorney answered the complaint on his insured's behalf on November 24, 1998. On January 27, 1999, just 64 days later, the insurance company adjuster wrote the first of five certified letters directly to its insured threatening to withdraw coverage because of his lack of cooperation. The next letter was dated February 15, 1999 and then again on March 1, 1999. On April 28, 1999, defendant failed to appear at his deposition. The deposition was rescheduled for June 29, 1999 and defendant's attorney sent him the fourth certified letter on June 16, 1999 informing him of a court order that he appear at the deposition.

On June 20, 1999, defendant's attorney sent a private investigator to defendant's home to meet him personally, but he was not at home. On June 26, 1999, the private investigator returned to defendant's home and went to his business address, but could not locate him at either place. On June 29, 1999, the day of the court-ordered deposition, the investigator went to the defendant's home a third time, at 8:15 a.m., to take the defendant to the deposition personally, but again the defendant was not at home and so he failed to appear at the second deposition.

On August 12, 1999, the adjuster sent defendant the fifth certified letter informing him that the insurance company was terminating his coverage. On August 24, 1999, the defendant's attorney withdrew. On October 1, 1999, the adjuster sent a letter to defendant informing him of the motion for entry of default judgment, which the court entered on October 22, 1999. (See court file of Hastings at the Michigan Court of Appeals)

From the first threatening letter until the actual withdrawal of representation, 209 days passed. During that time, the insurance company sent five certified letters threatening the

termination of insurance and hired an investigator to go to the defendant's home three times and his business another time to find him and to seek his cooperation.

In the present case, only 28 days passed from Ewing's first threat to withdraw until the court permitted his withdrawal. Neither the insurance company nor Ewing ever made such a threat while the Defendant was actually in business. They waited until more than four months passed after the Defendant filed bankruptcy! And then Ewing threatened Michael Novak, an attorney who no longer represented the Defendant and who had no incentive to cooperate. The company he formerly represented was no longer in business and was judgment-proof. Further, once the bankruptcy court lifted the stay, Plaintiff only sought recovery from Appellant's assets.

Ewing and Appellant did not make an attempt to seek Defendant's cooperation. What little effort they expended paled in comparison to what the attorney and insurance company did in Hastings. The Hastings insurer threatened its withdrawal almost immediately after counsel appeared in the case and followed up with letters two and four weeks later. The attorney hired an investigator to attempt to track his client down and to ensure his attendance at a deposition. Ewing and Appellant did none of these things. All Ewing did was write two letters and send the discovery to his client and hoped that the client would answer it. If the Defendant was supposed to answer the discovery itself, why did it need Ewing to represent it?

In Hastings, the insurance company tried through repeated notices and significant effort to encourage the cooperation of its insured, which was vital to its defense of a complex construction case. In this case, the insurance company did almost nothing to encourage cooperation, nor did it ever try to seek its information elsewhere, which was readily available, in a simple premises liability case.

The cases discussed herein demonstrate that insurance companies have a difficult burden to achieve in order to demonstrate they have been actually prejudiced. Courts have long been unwilling to find prejudice except in the most dire circumstances, such as actual fraud perpetrated in the midst of trial. Nothing that would rise to the level of actual prejudice occurred in this case.

c. Appellant was not prejudiced.

Appellee Qarana filed his suit in this Court on April 19, 2000. Appellee answered Defendant's interrogatories. Appellee could have been deposed and he could have been sent for an independent medical examination. Defendant's attorney could have begun the process of collecting documents and witness information immediately. Defendant's attorney could have interviewed its own employees. Defendant's attorney could have secured its own employee files. Instead, Defendant's attorney did virtually nothing to prepare a defense to this action. And then Defendant filed bankruptcy on August 15, 2000.

Four months passed between the filing of this suit and Defendant's bankruptcy. Appellant's retained attorney appeared in this case and had commenced discovery of the Appellee. There was no discovery performed internally of the Defendant even though Plaintiff's discovery requests were due almost four weeks before Defendant filed bankruptcy. Other than sending two letters to his client and making one telephone call to his client's attorney, Michael Ewing had no communication whatsoever with Defendant, as of the date the Interrogatories were served upon Defendant, June 23, 2000. Further, except for the possibility that Ewing's secretary called the manger of the Defendant, he had no communication whatsoever with anyone employed by the Defendant, except for leaving a couple of telephone messages which he claimed were not timely returned. Ewing dep., pp. 16-17, 21. Ewing claims that the only efforts he made to get the Interrogatories answered before the

bankruptcy were to have a few telephone conversations with a corporate attorney who represented the Defendant, Michael Novak. Ewing dep., p.23. Ewing never went to the Defendant's offices. Ewing dep., pp. 25-26. Ewing testified that the extent of his own discovery for the defense was sending two letters and making three or four telephone calls, requesting the Royal Oak Police report and reviewing Appellee's answers to his Interrogatories. Ewing dep., pp. 28-30.

Once the case went to bankruptcy, of course, Michael Novak was no longer a valid contact because the proper attorney for the corporation was now the bankruptcy trustee. Once Defendant filed bankruptcy, Ewing testified that the bankruptcy trustee would not help him, but he did not ask for help for months, even though Appellant was the only party which would be responsible for the payment of any damages after the stay was lifted. However, neither Ewing, nor anyone else at North Pointe moved the U.S. Bankruptcy Court for an Order (or any relief whatsoever) compelling the Defendant/Debtor or the bankruptcy trustee to cooperate in the defense of this action. Further, neither Defendant's counsel nor Appellant ever sought to challenge the default judgment itself, Helder v. Sruba, 462 Mich. 92, 611 N.W.2d 309, 315 (2000).

Appellant's only prejudice is that they will have to pay this judgment. The Court of Appeals has held that potential monetary loss is insufficient[2]. Appellant (or its counsel retained to defend Defendant) made no attempt to actually defend the case, they never sought the assistance of the

[2]"Lack of compliance by the insured is no defense to a garnishment action seeking to satisfy a default judgment unless the insurer can show it was prejudiced by its client's noncompliance. Prejudice is an issue of fact upon which the insurer carries the burden of proof. The prejudice defendants are required to show is something other than the fact that, if the summary judgment is denied, they might lose money, whereas if it is granted they might save money. Defendants must show they have been materially injured in their ability to contest the merits of the case by [their insured]'s non-cooperation.". Anderson v. Kemper Ins. Co., 128 Mich. App. 249, 253-54, 340 N.W.2d 87, 90 (1983) (citations omitted).

bankruptcy court, and they permitted the default judgment to enter, knowing full well that this garnishment proceeding was likely to follow.

d. Defendant would have lost on the merits of the case.

Most importantly, however, Defendant still would have lost on the merits of the case. Because of this fact Appellant was not prejudiced, and if the bankruptcy had not intervened, Appellant would still have to pay this judgment.

Defendant owed Appellee a duty as an invitee to protect him from dangers of which it knew or should have known. When Appellee was attacked by John Doe #1, John Doe #2, and John Doe #3, Defendant was negligent by removing Appellee and his assailant from the bar simultaneously. Expelling all of them onto the sidewalk together in front of the bar placed Appellee in an unreasonable risk of harm, of which Defendant knew the likelihood that Appellee would be attacked again. When his assailants attacked Appellee, right under the Defendant's marquee and in full view of Defendant's security personnel -- the same people who placed him in harm's way -- this was the proximate cause of his significant injuries. At worst, Defendant's personnel should have interceded to prevent Appellee's serious injuries. At best, they should have expelled Appellee separately from his assailants. Instead, Defendant's personnel thrust Appellee into the lion's den of his attackers and watched his beating. (See Qarana deposition, pp.18-25, attached as Exhibit 29.)

Appellee argued that this matter was controlled by the case of MacDonald v. PKT, Inc. 464 Mich. 322, 628 N.W. 2d 33 (2001). However, Michael Ewing testified at deposition that MacDonald was not a controlling case in this issue. He testified that the case of Schneider v. Nectarine Ballroom 204 Mich.App. 1, 514 N.W.2d 486 (1994) is the controlling case. Ewing dep., p. 58-59.

In Schneider, the facts were virtually identical. Security personnel of the bar ejected the assailants from the bar and soon thereafter, the Plaintiff was told to leave and ejected from the bar. As soon as the plaintiff was out of the door, his assailants attacked the plaintiff and beat him. This Court concluded that the plaintiff's injuries were reasonably foreseeable and that the defendant may have maintained a duty to protect the plaintiff from a reasonably foreseeable action.

The Court of Appeals has also released a case directly on this point, albeit unpublished. The case is Smith v. Hamilton's Henry VIII Lounge, Inc., Michigan Court of Appeals Case No. 231031 (August 2, 2002) (unpublished), attached as Exhibit 30. Similar to this case as well as Schneider, Smith was beaten by patrons who were ejected from the bar before he was ejected following a bar fight. As soon as plaintiff was thrown out, the plaintiff was beaten outside and seriously injured. This case was decided after MacDonald was released and the Michigan Court of Appeals held that the defendant had a duty to use reasonable care

> to protect plaintiff from the foreseeable criminal act perpetrated by the three men . . . because specific acts occurred in the bar with the initial altercation between plaintiff and two men and the ultimate assault . . . occurred in defendant's parking lot immediately outside the back door. There was clearly a known risk of imminent and foreseeable harm to plaintiff because the two men were ejected and [the security bouncer] knew that three or four men were lingering in the parking lot because he observed them on the video monitor. . . . Additionally, there was evidence that defendant did not *reasonably expedite* the involvement of the police. Smith, at 3. (italics in original).

Smith and Schneider are virtually identical to the facts of this case. In both of those cases, irrespective of MacDonald's holding, the Court of Appeals found that the bars had a responsibility to its patrons after it broke up fights and ejected the participants outside. The MacDonald case required that in order to avoid liability, a premises owner had to contact the police. Here, there has

never been an allegation, either by the Defendant or the Appellant, that Defendant ever contacted the police on behalf of the Appellee. MacDonald held that a land owner has no duty to protect and anticipate criminal acts against invitees; however, that holding changed if "a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond." MacDonald, at 335. The fight inside the bar would have lead a reasonable person to realize that throwing the participants out onto the street simultaneously would risk injury to the victim of the assault.

Therefore, while MacDonald is not controlling in the facts of this case, part of its ultimate holding supports Appellee's claim. Appellee would have been successful in this case on the merits. Any prejudice in this case was caused by Appellant when it permitted its hired attorney to withdraw from the case, leaving its insured subject to a default judgment.

Appellee's claims were made known in both the Complaint and his Answers to Defendant's Interrogatories. Defendant simply failed to prepare any defense to this action. But even if Defendant did attempt to fulfill its discovery obligations, Appellee would have succeeded in proving his claims by a preponderance of the evidence.

Appellant's obligation to prove actual prejudice is critical. Very simply, other than the fact that it will have to pay, it suffered no prejudice. It simply put its hand over its eyes and hoped for the best. Because of the lack of actual prejudice, this Court should deny leave to appeal.

B. **WAS THE COURT OF APPEALS CORRECT IN REVERSING APPELLANT'S SUMMARY DISPOSITION PURSUANT TO MCR 2.116 (C) (10) ON THE FACTUAL ISSUE OF WHETHER IT WAS ACTUALLY PREJUDICED BY DEFENDANT'S ALLEGED FAILURE TO COOPERATE WITH ITS DEFENSE OF THE UNDERLYING ACTION?**

APPELLEE ANSWERS, "YES."
APPELLANT ANSWERS, "NO."

The trial court granted Appellant's motion for summary disposition based upon MCR 2.116 (C)(10). Rather than restate all which has been stated before, the Court of Appeals correctly ruled that summary disposition in favor of the Appellant was erroneous because the question of whether an insurance company has established actual prejudice is one of fact, which cannot be decided by summary disposition. Smith, supra. "The question is generally one of fact . . . ." Allen, at 595. See also Anderson v. Kemper Ins. Co., 128 Mich. App. 249, 253, 340 N.W.2d 87, 90 (1983) ("Prejudice is an issue of fact upon which the insurer carries the burden of proof."); Bibb, supra.

The trial court relied on Brodgon, which is factually distinguishable from this case, as well as Coburn v. Fox, 425 Mich 300, 389 N.W.2d 424 (1986). Amazingly, Coburn found that the insurance company was liable on the garnishment. It seems the trial court relied upon Appellant's brief to that court in which Appellant stated that Coburn "reinforces that a breach of a cooperation clause is a complete defense and bars recovery unless the insurance is statutorily mandated to protect third parties." Appellant's Brief in Support of Motion for Summary Disposition, p. 15. Coburn does not stand for that proposition.

In Coburn, the Court had to decide whether non-cooperation was a valid defense for an insurer under the no-fault statute. The Court held that because no-fault insurance is mandatory, even prejudicial non-cooperation is not a defense. Id., at 307, 310. The Court did not decide whether the facts of the case rose to a level of non-cooperation or whether that non-cooperation was prejudicial

because those issues were not before it. Coburn did not change the rule that requires insurance companies to prove actual prejudice to avoid liability.

The trial court also found that Appellant was prejudiced partially because of a "high judgment award." Trial Court Opinion, p. 3. This is not a valid basis to assert prejudice. "The prejudice defendants are required to show is something other than the fact that, if the summary judgment is denied, they might lose money, whereas if it is granted they might save money." Anderson, at 253-54. Appellee provided sworn testimony of the incident, his injuries, his lost wages, medical bills, his pain and suffering and his permanent scarring to the trial court at the hearing on his motion for entry of default judgment. Appellant had notice of this hearing. The court heard the testimony and awarded the amount of the judgment. Appellant did not contest the amount, nor has it ever attempted to attack the judgment. In fact, Appellant acknowledged at the summary disposition hearing that the judgment was valid and it would have to pay the amount demanded if the court found for the Plaintiff. Motion hearing, pp. 43-44. It was erroneous for the trial court to use the amount of the judgment as a basis to grant summary disposition to Appellee. The Court of Appeals corrected that error.

In its application to this Court, Appellant states that it was the prejudiced party! It claims that entry of the default judgment against it was prejudicial and decries the wrongs it suffered at the hands of an insured which "thumb[ed] its nose at its insurance company." (Application, p. 26) If this were not so serious, this allegation would be comical.

As a matter of law, the burden to prove actual prejudice is on the Appellant, which has been the requirement for almost 50 years, and it is a question of fact for the fact finder to decide. The trier of fact should be able to consider evidence of what an insurance defense attorney is supposed to do

in these circumstances and whether what Ewing did was appropriate. If the burden is not on the insurance company, then it would be in the insurance company's best interest to foster non-cooperation. That would be a public policy disaster.

Appellant relies upon Flamm v. Scherer, 40 Mich. App. 1; 198 N.W.2d 702 (1972) for the proposition that Paragon's alleged failure to comply with an insurance policy condition breached the policy, allowing Appellee to terminate its insurance contract. Flamm is a UCC case concerning the sale of pickle seeds. The court held that because the Plaintiff first breached the sales contract by failing to deliver the proper type of pickle seed, it could not recover from defendant for damages.

This case is distinguishable because the insurance contract between Paragon and Appellant does not allow Appellant to unilaterally declare the contract breached and cease coverage. Also, relying on Flamm would create a public policy disaster.

Insurance companies have a greater obligation than do regular companies. With that obligation comes the responsibility which insurance companies do not like to face as part of their existence -- that sometimes they will have to pay claims to their insureds and damages on behalf of their insureds.

If Flamm were the law of insurance contracts, it would create an incentive for insurance companies to solicit their insureds' non-cooperation. Insurance companies could tell their insureds, or at least the uncollectible ones, not to return calls and not to assist in the defense of their claims. The insurance company could then declare the contract breached and walk away from its responsibility. Without exaggeration, this would be an impossible scenario for our society to bear. Therefore, Flamm's reliance is totally misplaced.

Finally, Appellant relies upon this Court's unanimous decision in Koski v. Allstate Ins. Co., 456 Mich. 439, 572 N.W.2d 636 (1998). However, Appellant only picks and chooses the parts in Koski it likes. Koski was a failure to notice case. The insured did not notify Allstate of a suit against him, although Allstate did have notice of the claim and injury, and the plaintiff entered a default judgment. Plaintiff's counsel then informed Allstate of the judgment and demanded payment. This Court held that the insured's failure to forward legal papers to Allstate was a condition precedent to liability. Allstate did not receive notice of the suit until more than three months after the judgment entered against its insured. This Court wrote:

> However, it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position. Koski, at 444.

The Court held that Allstate was prejudiced by the failure of notice. "The record indicates that Allstate had no knowledge of the suit until three months after the default judgment was entered. Consequently, Allstate's only recourse toward setting aside the judgment was a motion under MCR 2.612, which requires extraordinary circumstances not in existence here. Therefore, the resulting prejudice suffered by Allstate is clear." Koski, at 447.

Thus, just six years ago, this Court affirmed the rule that an insurance company must establish prejudice to avoid liability following an allegation of its insured's breach of the insurance contract. To overrule Koski, Allen, Leach, Weller, and their progeny both in this Court and the Court of Appeals would be tantamount to ignoring the concept of stare decisis upon which the legitimacy of our entire legal system is based.

Since the facts demonstrate that Appellant was not actually prejudiced, the Court of Appeals decision was correct and this Court should not disturb it.

IV. CONCLUSION

Appellant is asking this Court to review insurance contracts as written. Unfortunately, like most contracts, insurance contracts do not define each and every term. That is why courts are called upon to decide what terms in contracts mean. For almost 50 years, this Court has defined what it means to cooperate with an insurance company under the insurance company's contract. This Court has consistently held that in order for an insurance company to prove that its insured has failed to cooperate with it, the insurance company must prove that the non-cooperation has actually prejudiced it in its defense of a claim. Further, such prejudice must be more than, if we lose we have to pay but if we win we do not have to pay. In this case, the insurance company attorney, hired to represent the insured simply failed in his duty to defend the lawsuit. He made no actual effort to meet with or communicate with his client, except to write perfunctory letters about trial and pre-trial dates. His effort at answering interrogatories began and ended by sending them to his client with a cover letter that said, in sum, answer these and send them back. His defense of the case began and ended by sending one set of interrogatories to the Plaintiff.

Once the insured filed bankruptcy, the attorney closed his file. He did nothing. Even though the purpose of the motion to lift the automatic stay in the bankruptcy court was to permit the Plaintiff to seek recovery from the insurance company only, which was his ultimate employer, he chose not to contest the motion, appear at it, or use the power of the bankruptcy court to defend his case.

Now we have an Appellee who suffered severe injuries. Had the insured remained in business, it is likely that this case would have been defended in a normal manner and proceeded to trial or settlement. But no one will ever know.

Bankruptcy, like death, is not the end of the insurance company's obligations. Our legislature and the insurance contract confirm this. Appellant is trying to avoid its obligations by hiding behind the failures of the lawyer it hired to defend its insured. If this Court permits that to happen, as this Court warned would happen decades ago, insurance companies will use underhanded tactics to assist the non-cooperation of its insureds.

The Court of Appeals made the right decision and this Court should not disturb it. The matter should go to trial and allow the trier of fact to determine whether the insurance company was prejudiced.

Respectfully submitted;

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Dated: December 20, 2004